Supreme Court, U.S.
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No. 06-1421

In The
Supreme Court of the United States

BRIDGES COOK, Representative of the Estate of Wilhelmena Cook, deceased,

Petitioner,

vs.

DIANA HAYS and OPTIONS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR CERTIORARI

DONALD JUNEAU
Counsel for Petitioner
P.O. Box 1857,
214 S.W. Railroad Avenue
Hammond, Louisiana 70404-1857
Telephone: [985] 429-0830
FAX: [985] 542-0046
e-mail: Mozarabica@aol.com

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OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the exemption for "sitters" and "companions" embodied in the 1974 amendment of the Fair Labor Standards Act, 29 U.S.C. § 231(a)(15), applies to domestic service workers who are employed full-time by a third-party employer, but who are not the recipients of specialized medical or social-welfare training?

2. Whether the Regulation of 29 C.F.R. § 552.6 has been correctly applied to the Petitioner, as to require specialized medical or social-welfare training for direct care-workers and whether such an interpretation is entitled to deference under this Court's holding in *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), as modified by *United States* v. *Mead Corp.*, 553 U.S. 218 (2001)?

PARTIES TO THE PROCEEDINGS

Petitioner is Bridges Cook, the legal representative of the Succession of Wilhelmena Cook, deceased.

Respondents are Diana Hays and Options, Inc., a Louisiana Corporation.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to Rule 15.8 of the Supreme Court, petitioner files this Brief supplementing the Petition for Certiorari.

In a letter to the Clerk of Court, dated June 22, 2007, counsel for respondents waived the filing of an opposition to the *Petition for Certiorari*, because counsel perceived that the *Petition* was based upon an "identity of the issues in this case and a case just decided by this Court, *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. ___; 2007 WL 1661472 (June 11, 2007)." Letter from Thomas Hubert to Clerk of the Supreme Court (June 22, 2007). Although petitioner did state in the *Petition* that the issues "are identical," *see Petition* at 4, this is not quite correct. The *Questions Presented* make clear that this case presents issues different from those decided by this Court in *Coke*. The *Petition* went into some detail that the petitioner, the late Ms Wilhelmena Cook, was not claiming under the "companionship" rubric of 29 U.S.C. § 213(a)(15), 29 C.F.R. § 552.6 and 29 C.F.R. § 552.109(a), but rather as a domestic care-giver under 29 C.F.R. § 552.3. *Petition*, pp. 4, 7-10.

The record below shows that Ms Cook performed extensive domestic care services, and by no stretch of the term could she be considered to have provided "companionship" services. In this record is Ms Cook's deposition, where she was subjected to a lengthy and thorough interrogation by counsel for respondents as to what she did during her work-day. Ms Cook was compelled to follow a lengthy and detailed "Plan of Care," which minutely directed her daily activities with her client. This "Plan of Care," as respondents conceded, was promulgated by the

Louisiana Department of Hospitals, which in turn based it upon federal regulations, since the client was the recipient and beneficiary of federal medicare and medicaid funds.

The *Petition* also made it clear that the cases relied upon by the lower courts, *Salyer* v. *Ohio Bureau of Workers' Compensation,* 83 F.3d 784, 787-788 (6th Cir.), *cert. denied,* 519 U.S. 964 (1996); *Cox* v. *Acme Health Services*, 55 F.3d 1304, 1306-1310 (7th Cir. 1995); *McCune* v. *Oregon Senior Services Division*, 894 F.2d 1107 (9th Cir. 1990); and *Terwilliger* v. *Home of Hope, Inc.,* 21 F.Supp.2d 1294, 1301-1303 (N.D. Okla. 1998) *further proceedings before Magistrate Judge*, 42 F.Supp.2d 1231 (N.D. Okla. 1999), all went off on the notion that a domestic care-provider must be a licentiate or recipient of specialized medical training. *Petition*, pp. 9-10. But that is quite clearly *not* what is required in the statute, 29 U.S.C. § 213(a)(13); the regulation, 29 C.F.R. § 552.3; and the legislative history of the 1974 Fair Labor Standards Act Amendments. There is not a word in the statute, regulation or congressional proceedings which supports the engrafting of professional health or social welfare professional training onto the general concept of "domestic care-giver." The regulatory draftspersons drew up 29 C.F.R. § 552.6 to prevent the "companionship" exemption from covering trained medical workers. In other words, it was an exemption within the exemption which brought these individuals under the Fair Labor Standards Act. This is common-sense reading of § 552.6, and it should not be used in a tortured manner as a basis to disqualify direct-caregivers otherwise covered by the Act's 1974 amendment.

This Court's unanimous decision in *Coke* began its factual analysis by stating that Ms Coke was "a domestic worker who provides 'companionship' services to elderly

and infirm men and women * * * ." *Coke*, supra, 2007 WL 1661472, at *4. It then began a long and quite involved discussion on the applicability and enforceability of §§ 552.6 and 552.109(a), noting the tension between these provisions and § 552.3. *Coke*, supra, 2007 WL 1661472, at *7-*9.

All of this analysis was in the context of the "companionship" exemption, and the Court concluded that the regulations were validly promulgated and controlled the situation of Ms Coke. Petitioner Cook, on the other hand, does not challenge the validity of the regulations, but rather there application. Petitioner never contended that she was a "companion." She insisted that she was a *domestic service worker*, and that her duties clearly put her under § 552.3. Respondents never disputed this; instead, they argued that Ms Cook was a "companion," as contemplated by § 552.6, and their asseveration was that her lack of specialized professional training placed her into that companionship category. Neither the District Court nor the Court of Appeals even mentioned 25 C.F.R. § 552.109(a), the regulation under attack in *Coke*, but rather held, without any support in the record, that petitioner was a "companion," because she had not been a species of "trained personnel," and her "training and duties fall short of her being considered 'trained personnel.'" *Cook* v. *Hays*, 2006 U.S. App. LEXIS 302070, at *2 (5th Cir. 2006), *aff'g*, 2006 U.S. Dist. LEXIS 36009, at *1-*3 (E.D. La. 2006). Nor was there any discussion in these opinions about the deference due under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837 (1984).

The question whether particularized medical training was a prerequisite for inclusion under the direct care-giver

rubric was not before the Court in *Coke*, but is squarely presented in this case. A careful reading of § 552.6 shows that the specialized medical training requirement was drafted to take trained professional workers out from under the "companionship" exemption, so that this category of persons would not be subject to the exclusion. Petitioner's position is one who contests the *application* of a regulation, not a facial attack upon it, and, as this Court recently noted, petitioner has mounted "a proper as-applied challenge in a discrete case." *Gonzales* v. *Carhart*, 551 U.S. ___, 127 S.Ct. 1610, at 1638, 1639 (2007) (citations omitted). This challenge is based upon an extensive factual record, not disputed by respondents, which demonstrates beyond any cavil that Ms Cook did not function as a "companion" or a "sitter": she was a direct care-giver covered by the Fair Labor Standards Act.

CONCLUSION

For the above and foregoing reasons, petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DONALD JUNEAU
P.O. Box 1857,
214 S.W. Railroad Avenue
Hammond, Louisiana
70404-1857
Telephone: [985] 429-0830
FAX: [985] 542-0046
e-mail: Mozarabica@aol.com
Counsel for Petitioner

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